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Tracking the Splits: Fault Lines on the George Court

By Gerald F. Uelman

Being a California Supreme Court watcher has become a much more interesting pastime during the year. Throughout the nine years of the "Lucas Court," despite frequent comings and goings on the Court, the pattern of the decisions remained relatively stable. There was a solid conservative phalanx of five votes, one old "liberal" war-horse who frequently dissented, and then there was Justice Kennard, the least predictable Justice. Trying to predict which way she would go was a moot exercise, however, because the only difference it usually made was whether the decision would be 6-1 or 5-2. Each year, only a handful of cases were decided by a 4-3 margin, when a shift of one Justice made a difference in the outcome.

All that has changed with the current configuration of the "George Court." This article explains how the change came about and offers some speculation regarding how the change might affect how the justices line up in future cases. Lawyers still need to know how to count to four as every good appellate lawyer carefully assesses the prospects of winning four votes and identifying from whom those votes are most likely to come.

— What Changed? —

What is truly remarkable about the new constellation of our Supreme Court is that it is *not* the product of recent new appointments. Rather, it is the product of a pronounced shift of position of two sitting Justices — Justice Kathryn Werdegar and Chief Justice Ron George. The shift is easily documented. Each year for the past ten years, I have compiled an annual chart analyzing the rate of agreement and disagreement among the Justices in decided cases. "Agreement rates" simply quantify the frequency with which two Justices vote the same way in a published opinion. Although Justices may concur or dissent for different reasons, the rate of agreement or disagreement simply counts up which side they were on in terms of the result. For the past five years, the two polar positions on the court have been defined by Justice Stanley Mosk, who ordinarily logs the highest dissent rate, and Justice Marvin Baxter, the most conservative of the conservative bloc.

When he was first appointed to the court in 1991, Justice Ron George became a dependable ally of Chief Justice Malcolm Lucas. Their rate of agreement was an astounding 100% during Justice George's first year. Like Justices Scalia and Thomas on the U.S. Supreme Court, they seemed to be joined at the hip. Since then, there has been a steady shift (See [Table 1](#)). Chief Justice George's rate of agreement with Justice Stanley Mosk has steadily increased, while his rate of agreement with Justice Marvin Baxter has steadily declined. His own rate of dissent, however, has fluctuated at a relatively low rate suggesting that his own movement was accompanied by movement elsewhere on the court.

The shift of Justice Kathryn Werdegar has been somewhat more abrupt. When she was appointed in 1994 many assumed she would be moderate. She ended up closer to Justice Marvin Baxter than most people expected. (See [Table 2](#)). But last year, her rate of agreement with Justice Baxter dropped dramatically and her rate of agreement with Justice Mosk went sharply up so that her rate of agreement with Mosk is actually *higher* than her rate of agreement with Baxter.

— A Center Emerges —

As a result of these shifts, we actually have seen a center emerge on the court. This can be seen in the rates of agreement between Chief Justice George and Justice Werdegar with each of their colleagues. Chief

Justice George (See [Table 3](#)) is dead center, with his most likely soulmates to be Justices Werdegar and Justice Ming Chin. Justice Werdegar is also close to center (See [Table 4](#)), with relatively the same rate of agreement with all of the other Justices except George, her most frequent co-signor, and Justice Janice Brown, her least frequent co-signor. The tandem nature of this shift is apparent from the three year history of the rate of agreement between Chief Justice George and Justice Werdegar (See [Table 5](#)). Their rate of agreement has remained quite consistent.

— What Difference Will This Make? —

First, we are seeing a much higher rate of 4-3 splits in the Court's decisions. In the first eighteen months after Ron George became Chief Justice (April 1, 1996 to October 31, 1997), there were eighteen cases decided by margins of 4-3. The extent to which Chief Justice George has positioned himself at the center is evident from one remarkable statistic. (See [Table 6](#)). In every one of the 4-3 splits, Chief Justice George has been in the majority. Most frequently, these splits will find Justices Baxter, Brown and Chin (The "BBC" bloc) on one side, and Justices Kennard, Mosk and Werdegar (The "KMW" bloc) on the other side. That was the lineup in ten of the eighteen 4-3 splits. Which side wins, of course, depends upon whether Chief Justice George allies himself with the "BBC," or with the "KMW." The "BBC" has a decisive edge, winning George's vote in seven of the ten cases.

— Criminal Cases —

The nature of this configuration is even more significant in criminal cases. Seven of the eighteen 4-3 splits were in criminal cases. (See [Table 7](#)). In five of the seven, the line-up of the Justices saw the "BBC" on one side, and the "KMW" on the other. Chief Justice George sided with the "BBC" on four of those five cases. There was only one case decided by a 4-3 margin in the first eighteen months which the defense won and that was the only criminal case in which Chief Justice George sided with Justices Mosk, Kennard and Werdegar. The case was *People v. Nesler*, 16 Cal.4th 561 (1997), in which the Court reversed the sanity phase trial of Ellie Nesler for jury misconduct. Chief Justice George authored the lead opinion.

Two aspects of the 4-3 splits in criminal cases are worth noting. First, the four Justice majority in some of these decisions is itself splintered. One must read these opinions quite carefully because there may actually only be a three Justice plurality for the lead opinion with a concurring Justice writing separately and limiting the reach of the plurality holding. The *Nesler* case itself has no majority opinion. Another recent example is *People v. Monge*, 16 Cal.4th 826 (1997), which holds that the double jeopardy clause does not preclude retrial despite a reversal of a finding of a prior conviction for insufficiency of evidence. Justice Chin's opinion is only joined by a plurality of three, with Justice Brown concurring on much narrower grounds. Even 5-2 decisions may lack a majority opinion. A ruling reaffirming the Court's prior decision in *Ramona R. v. Superior Court*, 37 Cal.3d 802 (1985), and allowing the use of statements of minors made to probation officers for fitness hearings for subsequent impeachment relied upon different opposing concurring opinions to provide a majority for each branch of the holding. *People v. Macias*, 16 Cal.4th 739 (1997).

Criminal lawyers should also note that Justice Janice Rogers Brown has become a wild card in criminal cases. While she is solidly in the conservative camp in civil cases, she occasionally joins the dissenters in criminal rulings. She was actually with the dissenters in three of the seven 4-3 splits in criminal cases. She even joined the dissents in two death penalty affirmances. Her dissent in *In Re Visciotti*, 14 Cal.4th 325 (1996), is a stinging repudiation of the low standard of competence of trial counsel the court tolerates in death penalty cases. While we have yet to see a majority formed in a 4-3 split without winning Chief Justice George's vote, the potential is there for the defense to win a case by enticing Justice Brown to join Justices Mosk, Kennard and Werdegar.

— Concurring Opinions —

Criminal Lawyers are not the only ones who must carefully read the concurring opinions. The past two years have seen a sharp upturn in the publication of concurring opinions by Justices of the California Supreme Court (See [Table 8](#)). I see this as a healthy sign that there may be less pressure to speak with one voice. But it makes our jobs as lawyers more difficult. Occasionally, a concurring Justice joins only in the majority

judgment, but not the lead opinion. If that Justice's vote is necessary to form a majority of four, the lead opinion is not actually the opinion of the Court. There may not be an opinion of the Court and lawyers and judges must analyze all the majority opinions to discern when they agree or disagree. It is surprising how often this elementary reality is overlooked by lawyers and judges who cite as law opinions that do not command a majority. One prominent recent example was the decision striking down the parental consent law for minors seeking an abortion. *American Academy of Pediatrics v. Lungren*, 16 Cal.4th 307 (1997). Although the case decided a host of significant issues regarding the right of privacy under the California constitution, there is NO majority opinion. Chief Justice George's lead opinion commanded only three votes, and Justice Joyce Kennard concurred in the judgment only.

— Conclusion —

The tandem movement of Chief Justice Ron George and Justice Kathryn Werdegar has created a center on the California Supreme Court. The voting patterns in 4-3 splits, which have become much more frequent, can provide a helpful predictor of where a lawyer is likely to find the four votes needed to win. And every lawyer and student of the Court must carefully read *all* the opinions of the Justices to ascertain the law of California.

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TABLES FOR ARTICLE

Table 1

Chief Justice Ron George

Rate of Agreement with Justice Stanley Mosk:

1993:	60.4%
1994:	53.6%
1995:	64.8%
1996:	69.9%
1997:	75.7%

Rate of Agreement with Justice Marvin Baxter:

1993:	97.9%
1994:	91.0%
1995:	89.9%
1996:	89.2%
1997:	84.2%

Rate of Dissent:

1993:	5.2%
1994:	7.0%
1995:	2.2%
1996:	8.6%
1997:	1.3%

Return to [body of article](#).

Table 2
Justice Kathryn Mickle Werdegarr

Rate of Agreement with Justice Stanley Mosk:

1995:	72.2%
1996:	69.3%
1997:	82.2%

Rate of Agreement with Justice Marvin Baxter:

1995:	91.7%
1996:	89.1%

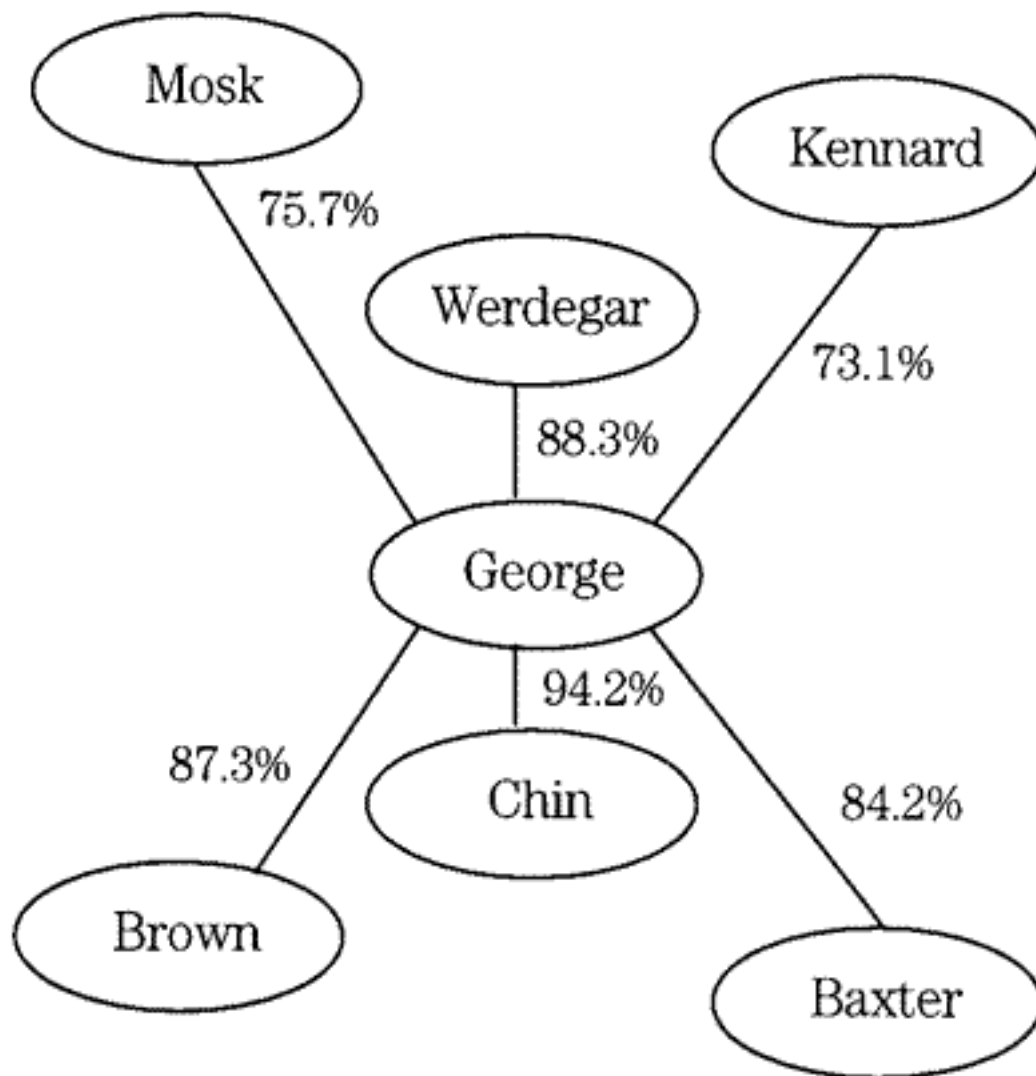
1997:	80.5%
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Rate of Dissent:

1995:	6.5%
1996:	4.9%
1997:	10.1%

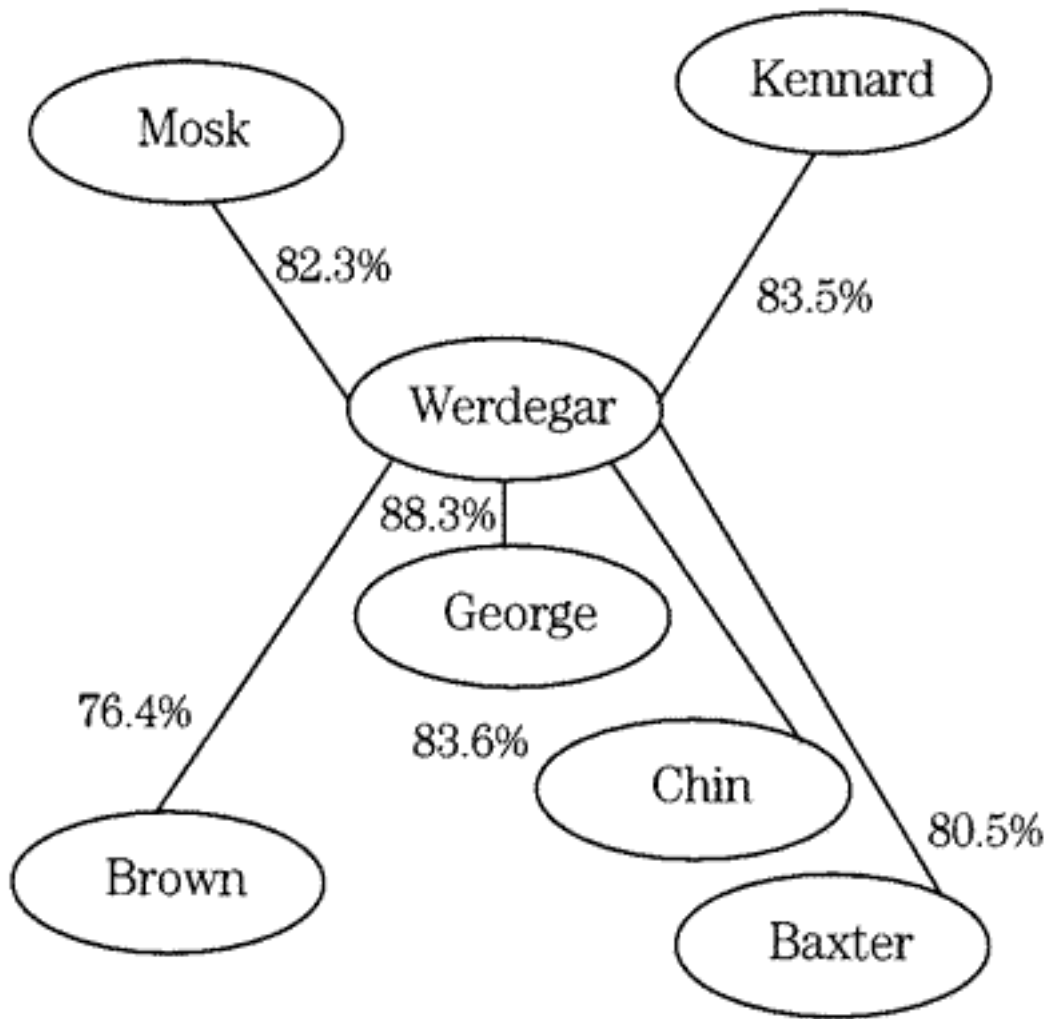
Return to [body of article](#).

Table 3
Rates of Agreement with Chief Justice Ron George



Return to [body of article](#)

Table 4
Rates of Agreement with Justice Werdegar



Return to [body of article](#).

Table 5
Rate of Agreement Between
Justice Werdegar and Chief Justice Ron George

1995:	91.7%
1996:	87.0%
1997:	88.3%

Return to [body of article](#).

Table 6
April 1, 1996 Through September 30, 1997
Eighteen 4-3 Opinions

Number of Times in the Majority:

George	18
Chin	13
Brown	11
Baxter	10
Werdegarr	7
Kennard	7
Mosk	6

Return to [body of article](#).

Table 7
Criminal Cases
April 1, 1996 Through September 30, 1997
Seven 4-3 Opinions

Number of Times in the Majority:

George	7
Chin	6
Brown	4
Baxter	6
Kennard	3
Werdegarr	1
Mosk	1

(One Decision for Defense)

Return to [body of article](#)

Table 8

Number of Concurring Opinions

Year	No. of Majority Opinions	No. of Concurring Opinions	Ratio
1994	100	25	1:4
1995	91	23	1:4
1996	105	51	1:2.1
1997	80	35	1:2.3

Return to [body of article](#).

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